Supreme Court, U.S.
FILED
FEB 20 1996
CLERK

(3)

No. 95-944

In The

Supreme Court of the United States

October Term, 1995

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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February 20, 1996

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

The Postal Service's opposition[1] to ACCA's petition does not dispute the existence of any of the conflicts among the circuits raised by ACCA. Instead, the Postal Service merely attempts to minimize their effect on the decision below. The conflicts and their effects on this case, however, are substantial. Indeed, resolution of these conflicts is important beyond the instant petitioners and beyond even future litigants challenging Postal Service rulemaking. Resolution is important to all litigants and courts interested in an orderly analytical framework for construing statutes and more predictable and consistent results in cases involving statutory construction.

A. THE POSTAL SERVICE'S ARGUMENTS ON THE MERITS FAIL TO DISPUTE THE SIGNIFICANT CONFLICTS RAISED BY THE LOWER COURT'S OPINION

The Postal Service opposes ACCA's petition with the following five arguments: (1) the statutory word "rate" does not bar the Postal Service from individually negotiating prices and services, because the term rate "is not confined to a price available to all or most customers," Opp. 12; (2) whether or not the court of appeals "presumed" any authority, the Postal Service "plainly has statutory authority to establish rates through individual agreements with customers," Opp. 15-16; (3) the court

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[1] Brief for the Respondent in Opposition cited as "Opp. ___."

below gave the legislative history "little consideration" in interpreting the statute, Opp. 17; (4) the court did not really defer to the Postal Service's interpretation of the statute, Opp. 17-18; (5) the conflict between the circuits as to the "primary purpose" and "dominant objective" of the Postal Reorganization Act (PRA) "is too abstract, and too attenuated" from the outcome to warrant review, Opp. 18-19. None of the Postal Service's arguments withstands scrutiny or disputes the existence of the conflicts.

1. The Postal Service's alternative dictionary definition of "rate" actually supports ACCA's position that the Postal Service must publish rates and classes of service in compliance with the public utility model. ACCA does not contend that such rates must be "available to all or most customers," as the Postal Service alleges, Opp. 12, but rather that they must be offered to those customers who meet the objective terms of the rate offered. Although the alternative definition does not specifically relate to the relevant utility context, it calls for a "charge, payment, or price *fixed according to a ratio, scale, or standard,*" Opp. 12 (emphasis added), thereby mandating an objective method of calculating the amount owed on any transaction in a way that is antithetical to variable prices "*determined through negotiation* between the Postal Service and the mailer . . . . " ACCA Petition Appendix 61a (cited as "ACCA Pet. App.") (emphasis added). Similarly, the definition of "rate" in *United Parcel Service, Inc. v. United States Postal Service*, 604 F.2d 1370, 1376 n.7 (3d Cir. 1979) as "the *method* by which an *amount* of postage due from the mailer is to be calculated . . . " is entirely consistent with the Black's Law Dictionary definition quoted by

ACCA, ACCA Pet. 22, and is inconsistent with the negotiated contract prices of the International Customized Mail (ICM) program.

2. The Postal Service has now abandoned its reliance upon the Universal Postal Convention, upon which it relied in its rulemaking notice and the courts below, for its authority to negotiate ICM contracts. ACCA Pet. App. 64a. It now relies exclusively upon a hodgepodge of PRA sections to cobble together its alleged individual contracting authority. Opp. 15-16.[2] The Postal Service's reliance upon the general provisions of § 401 to expand the specific powers conferred by § 404 violates the fundamental principle of statutory construction that the specific limits the general. The Postal Service's limitless view of the general provisions would allow it unfettered discretion to disregard the carefully crafted specific ratemaking provisions adopted by Congress.

3. In its Opposition, the Postal Service cites to the opinion below, ACCA Pet. App. 28a-36a, to argue that the Third Circuit did not run afoul of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) by considering the legislative history in step one. The Postal Service claims that the Third Circuit did not violate *Chevron* because the legislative history "played little role" and the court gave it "little consideration" in construing the PRA. Opp. 17. The Postal Service completely ignores

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[2] The Postal Service's reliance upon *Rockville Reminder, Inc. v. United States Postal Service*, 480 F.2d 4, 7 (2d Cir. 1973), Opp. 16 n.11, is misplaced. The breadth of the Postal Service's rulemaking authority is governed by the statutory delegation, not by the geographic scope of the Postal Service's activities.

Section II of the Third Circuit's opinion, ACCA Pet. App. 4a-8a, which begins with: "[b]efore addressing standing and the merits, we consider the history of the statutory sections and regulations at the core of this dispute." *Id.* 4a. The conclusion of Section II, that the PRA launched the Postal Service into the "commercial world," *id.* 7a, animates the court's entire analysis of the merits with no fewer than four reiterations of that conclusion, *id.* at 30a-31a, 40a, 41a. Contrary to the Postal Service's contention, the legislative history is the lynchpin of the decision below. The court's reliance on legislative history in *Chevron* step one is at the center of the important textualist-intentionalist conflict that calls for this Court's review.

4. The Postal Service admits that it urged the court of appeals to give deference to its statutory interpretations and continues to cite new cases in support of such deference by this Court. Opp. 18 n.13. The Postal Service, nevertheless, contends that the Third Circuit "explicitly declined to accord deference . . . , and arrived at its interpretation upon *de novo* consideration of this issue." Opp. 17-18. The appellate court's analysis belies that disclaimer. The court clearly used the legislative history to give primacy to the Postal Service's business considerations, *see* ACCA Petition 10-11, and then deferred to the Postal Service's business judgment to circumvent each statutory hurdle to the ICM program, *see* ACCA Petition 11-12. If that constitutes a rejection of deference by the Third Circuit as claimed by the Postal Service, all the more reason exists to resolve the admitted conflict by granting ACCA's petition. *See Fort Wayne Community Schools v. Fort Wayne Education Association*, 977 F.2d 358, 366 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 90 (1993), which

the Postal Service cites as requiring deference, Opp. 18 n.13.

5. The Postal Service dismisses the undisputed conflict among the circuits over the PRA's "primary purpose" or "dominant objective" as "general characterizations", "too abstract, and too attenuated from the actual result" in either of the conflicting cases to warrant review. Opp. 19. Any fair reading of the opinion below reveals that the legislative history played a central role in the court's interpretation of the PRA, ACCA Pet. App. 4a-8a, 30a-31a, 40a-41a, *see* ACCA Pet. 8-12, and that the court's determination of the "business" purpose of the Act was pivotal to the result.

B. ACTUAL COMMERCIAL INJURY CONFERS STANDING ON ACCA

The Postal Service claims error in the court of appeals' conclusion that UPS has standing to challenge the ICM program, Opp. 21, although it claims no specific error in the Third Circuit's finding "that ACCA has standing to intervene." ACCA Pet. App. 24a n.12. Nevertheless, the Postal Service opposes review of the issues raised in ACCA and UPS's petitions "until a case presenting [the issues] is brought by a proper party," such as a "[user] of the mails." Opp. 21. The Postal Service's position on standing contradicts its argument that it has commercial freedom. The Postal Service's Opposition again admits that it adopted the ICM program to "attract new customers that would otherwise use private couriers . . . . " Opp. 4. It is unrealistic to expect a Postal Service customer, who could only benefit from any

predatory pricing enabled by the ICM program, to challenge it. It is inconceivable that only the favored customers, and not the targeted competitors, of a $55 billion "business" have standing to challenge such admittedly threatening conduct, whether or not it has the trappings of a government regulation. ACCA's undisputed claim of "actual injury" to a member, *see* ACCA Pet. 7, clearly confers Article III standing on ACCA where "imminent" or "threatened" injury was sufficient to confer Article III standing on UPS, ACCA Pet. App. 9a-10a. Whether or not "prudential" standing can be waived, ACCA Pet. App. 11a-13a n.6, the Postal Service's invitation to competitors to seek judicial review, its admission here of its intent to capture courier customers, the lack of any other likely class of plaintiff and the court of appeals' recognition of the PRA's concern with the Postal Service's competitors under 39 U.S.C. § 3622(b)(4), confirm that ACCA is indeed a proper party to challenge the ICM rule on behalf of its members.

C. CONCLUSION

ACCA respectfully requests the Court to grant its petition.

February 20, 1996

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